



Agenda

Jefferson County Planning Commission

Wednesday, September 6, 2023 at 7:00 PM

**By order of the President of the Jefferson County Planning Commission,
Public Participation is available in-person only.
The meeting will be broadcast live via ZOOM for viewing purposes only.**

In-Person Meeting Location: County Commission Meeting Room located in the lower level of the Charles Town Library (side entrance on Samuel Street)
200 East Washington Street, Charles Town, WV 25414

ZOOM Broadcast Information*: Meeting ID: 878 0526 1658
Meeting Link: <https://us02web.zoom.us/j/87805261658>

**If watching live broadcast, please ensure your microphone is muted and be mindful that your video is streaming to others.*

There is no public comment for the following items.

- 1. Legal Advice, Discussion and Action:** Discussion of VB BTS, LLC v. JEFFERSON COUNTY, WEST VIRGINIA, & THE JEFFERSON COUNTY PLANNING COMMISSION (United States District Court, Northern District Case No. 3:23-CV-171) including potential resolution/settlement offer presented by Plaintiff and Plaintiff's response to Planning Commission's counter offer.
- 2. Legal Advice and Discussion:** Discussion and review Jefferson County Circuit Court Civil Action No. 2021-C-109 (PC File #21-2-Z).
- 3. Non-Actionable Correspondence:**
 1. Adam McDowell, Et al., dated August 31, 2023
 2. Rachel Shub, Et al., dated September 1, 2023
 3. Corey Ash dated September 1, 2023

Non-Actionable Correspondence

August 31, 2023



TO: County Commissioners
Jefferson County Commission
124 E. Washington Street
P.O. Box 250
Charles Town, WV 25414

Jefferson County Office of Planning and Zoning
The Mason Building,
2nd Floor
116 East Washington Street, Suite 200
Charles Town, WV 25414

Attn: County Commissioners: Steve Stolipher, President; Tricia Jackson, Harpers Ferry District; Jennifer Krouse, Shepherdstown District; and Jane M. Tabb, Middleway District

Attn: Planning Commissioners: Mike Shepp, President; Matt Knott, Vice President; Wade Louthan, Secretary; Aaron Howell; Donnie Fisher; J. Ware; Tim Smith; Jack Hefestay

Subject: Consideration of a “Settlement” at September 6 and 7 meetings

Dear Commissioners:

As property owners in the Shannondale community, we are writing to register our objections to the irregular process by which the County appears to be willing to abandon the Planning Commission's decision made in June 2023 to deny Vertical Bridge's application for a lake-side cell tower at the earliest stages of Vertical Bridge's federal lawsuit against the County and the Planning Commission.

The Process

On Monday, August 29, 2023, the Planning Commission held an odd, hastily-notified public Special Meeting to consider an undisclosed "settlement offer" presented by Vertical Bridge. The Planning Commission permitted limited public comment generally, but not specifically about the settlement offer, the exact terms of which the Planning Commission refused to discuss or disclose in public at the meeting. Some members of the public had suspected that Vertical Bridge's "secret" settlement offer consisted of cloaking the proposed 100-foot tall monopole cell tower as a fake pine tree, covered in 10,000 pounds of fake PVC pine needles glued on to fiberglass reinforced plastic or epoxy fake pine branches and limbs. Our deduction was based on Facebook posts by the owner of the Mountain Lake Club touting a monopine as the solution to neighbors' complaints about the visual degradation presented by the monopole option.

The Planning Commission permitted members of the public to comment for a total of 30 minutes, and numerous speakers voiced strong objections to the monopine "solution" specifically and expressed continued opposition to a monopole at the site. Several speakers spoke in favor of the cell tower, some based on their belief that the property owners have the right to do whatever they want on their private land because "this is still America," and others opined that a cell tower will provide them with needed wireless service.

After the "Citizens Comment" session concluded, the Planning Commission moved into Executive Session to discuss the actual settlement offer with the County Attorney and to obtain his legal advice. Upon returning to the open meeting, the Commissioners expressed a variety of views, but the consensus was that the Planning Commission agreed that dressing up the cell tower as an unnaturally tall fake plastic pine tree would be a worse solution than the original monopole proposal. A few Commissioners, however, voiced concerns about the visual impact of the proposed monopole at the specified site given the openness of the site and its distance from the natural treeline. The Commissioners determined that, rather than accepting or rejecting Vertical Bridge's monopine settlement offer, they preferred to counter-offer, proposing that Vertical Bridge consider moving the proposed monopole further away from the lakefront and behind the natural treeline, maybe having Vertical Bridge paint the monopole a more natural green color, and requiring Vertical Bridge to add mitigating shrubbery around the tower base. The Commissioners also decided to publicly release Vertical Bridge's settlement letter.

At the urging of the County Attorney, the Commissioners set a date for a public meeting to further address the counteroffer concept for Wednesday, September 6, 2023, notwithstanding the extremely short time frame, the brief public notice, and the intervening Labor Day holiday. The false urgency for this meeting springs from the fact that the Stipulation extending the County defendants' time to respond to Vertical Bridge's federal court complaint expires on September 7, 2023.

Given that the parties are engaged in potential settlement discussions and that Vertical Bridge's attorney was present at the meeting, we could not understand why the County Attorney did not simply ask Vertical Bridge's attorney to extend the County's time to respond to the complaint for another week or two. If parties are discussing settlement possibilities in good faith, it would not make sense for Vertical Bridge to refuse a reasonable extension. Instead, Mr. Cochran is forcing the process -- and the Commissioners and the public -- to consider this important matter on an unnaturally and needlessly rushed basis.

We therefore request that the Planning Commission direct the County Attorney to seek an extension of the County defendants' time to respond to the complaint so that the Planning Commission can proceed in an orderly manner, with proper notice to the public and following the County ordinance's requirements for the consideration of cell towers.

Erroneous Legal Advice

After the Planning Commission returned from Executive Session on August 29, we were stunned to hear some Commissioners and Planning staff misrepresent that the County ordinance leaves the Commissioners with no discretion to turn down an application for a new wireless

communications tower, and to hear them express their incorrect belief that the Commissioners only have the power under the County ordinance to require an applicant to provide a little landscaping. This fundamental misunderstanding of the legal responsibilities and powers of the County Planning Commission is contradicted by the plain language of the Ordinance. Yet, for some inexplicable reason, County Attorney Cochran seems to have conveyed the completely erroneous legal advice that the Planning Commission simply acts as a ministerial "rubber stamp" to approve a new wireless communications tower once planning staff certifies that an application is "complete." Paraphrasing the immortal words of Col. Ollie North's lawyer, Brendan V. Sullivan, during the Senate Iran-Contra hearings, you are "not potted plants!"

Section 4B.7, Wireless Telecommunication Towers, of the County Zoning Ordinance, provides that a new wireless telecommunication tower is permitted in all zoning districts *subject to the provisions of this section*. This means that a new wireless telecommunications tower is not permitted as "an entitlement" "in all zoning districts, as some Commissioners mistakenly seem to believe. Rather, a new wireless telecommunications tower is only permitted *if it meets the detailed criteria set forth in Section 4B.7*. Moreover, some Commissioners erroneously think that the Planning Staff are the final arbiters of whether or not a tower application is complete and meets the criteria for approval. The County Ordinance clearly empowers only the Commissioners to make the critical approval or denial decisions for new wireless telecommunication towers in Jefferson County. Planning Staff's duties are limited under Section 4B.7 to determining that the applicant has complied with submitting all of the detailed information and supporting analyses and documentation required by this Section for consideration by the Planning Commission. In addition, Staff is required to notify the Jefferson County Historic Landmarks Commission of an application filing. But the substantive judgmental decision-making on the applications is reserved for a majority vote of the Commissioners.

Therefore, most importantly, Section 4B.7B(3)(c) requires that

"[t]he Concept Plan shall be reviewed at a public hearing conducted at a scheduled Planning Commission meeting. The scope of this public hearing shall include a demonstration of need as required under this Article, neighborhood compatibility, impact on cultural and historic sites, visual mitigation, the submittal and design criteria of this Article, and the compatibility of the facility proposal with the Comprehensive Plan, as well as any relevant information presented by any person that addresses the purpose and intent of this Article. *The Planning Commission shall review the proposed Tower for compliance with the standards in this Article and, if applicable, provide conditions relevant to the scope of the public hearing and/or unique characteristics of the proposed development site, to be addressed in Staff's approval of the site plan.*" (Emphasis added).

If Commissioners were "the potted plants" that the County Attorney apparently believes you must be under this ordinance, then why does the ordinance require the applicant to demonstrate "need" for the facility at the public hearing, along with neighborhood compatibility, impact on cultural and historic sites, visual mitigation, the submittal and design criteria of the Article, and the compatibility of the facility proposal with the Comprehensive Plan, as well as any relevant information presented by any person that addresses the purpose and intent of this Article? And if Commissioners are supposed to perform only the "ministerial" act of rubber-

stamping the application, why does Section 4B.7B(3)(c) mandate that "[t]he Planning Commission *shall review* the proposed Tower for compliance with the standards in this Article *and, if applicable, provide conditions relevant to the scope of the public hearing and/or unique characteristics of the proposed development site, to be addressed in Staff's approval of the site plan*" ?

Commissioner Duties and Responsibilities

Undeniably, Section 4B.7B(3)(c) empowers Commissioners to actively consider the evidence presented to you by the applicant, determine whether or not the applicant has met its burden of proof in meeting the code requirements for the new wireless tower, and requires you to balance those factors, as set forth expressly in Section 4B.1, Purpose and Legislative Intent, with the community's desire to preserve the County's rural, historic and agricultural character and the quality of its residential neighborhoods. Several of the Commissioner questions at the June 13 hearing pertained to this kind of inquiry.

Indeed, Section 4B.7B(3)(d) mandates that before Staff may approve a site plan for a tower, *the Planning Commission must find, by a majority vote, that the Concept Plan application complies with this Article, and that the application is consistent with the Comprehensive Plan.* This requires you to think, evaluate the evidence, balance the interests, and make reasoned and rational decisions -- you are not rubber-stampers or "potted plants." Commissioners would fail to carry out your sworn legal duties if you just ministerially approve Vertical Bridge's application because staff says it's complete. And in carrying out your sworn legal duties, you must assure that Vertical Bridge has met its "burden of proof," which is defined in Section 4B.7D as follows: "Applicant's Burden of Proof. The applicant for a site plan for any Tower bears the burden of demonstrating by substantial evidence in a written record that a bona fide need exists for the proposed structure at its proposed height and location as required in Subsection F, "Demonstration of Need", and that it has met all submittal and design criteria in this Article."

For whatever reasons, the Planning Commission has been operating under a gross misunderstanding of its legal duties and powers under the County Ordinance. The County Attorney publicly expressed his view that continuing to deny Vertical Bridge's application for the proposed monopole wireless cell tower is doomed to failure because under federal law and the County Ordinance the Planning Commission has no legal authority to deny the application. The County Attorney seems to lack a basic understanding of the federal Telecommunications Act of 1996, and in particular, 47 U.S.C. §337(c)(7)(A), which is entitled " **(7) PRESERVATION OF LOCAL ZONING AUTHORITY (A) General authority.**" That subsection provides: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." The County Ordinance at issue, Section 4B.7, is fully compliant with, 47 U.S.C. §337(c)(7), including its provisions on local zoning authority.

Very unfortunately, this misunderstanding of the law became the source of baseless statements at the August 29, 2023 public meeting that, because the Planning Commission has

never before turned down a wireless telecommunications tower application before, the Planning Commission was wrong to do so in June 2023.

Next Steps

The public remains unclear about what's going on and what is expected to happen at the September 6, 2023 Special Meeting of the Planning Commission and the regularly scheduled meeting of the County Commissioners on September 7, 2023. On August 29, 2023, a proposal by one Commissioner to publish and submit Vertical Bridge's settlement offer for public comment was turned down. While no particular support was expressed for the monopine settlement offer, its status is left hanging, other than the decision to publish it, without any clarification of a process for further consideration or next steps.

Having now looked at the settlement offer, we reiterate the concerns raised by Mr. Berg and also note that the pictures have raised additional process concerns. Notably the monopine is much wider and bulkier than even the monopole with its broad set of racks and antennas above the tree. Moreover, the latest simulation and the map show the tower location on the left side of the gravel lot, rather than on the opposite right side, as submitted in the June Concept Plan. This is plainly a proposal that goes beyond just fake pine decoration, and requires a new application. (See pictures herewith.)

Subsequently, at the August 29, 2023 Special Meeting, there was a discussion of other possible ways to minimize the visual effect of a monopole, leading to directions to the County Attorney to explore with Vertical Bridge the possibility of using other mitigation techniques--moving the tower behind the existing tree line, adding shrubbery, and perhaps painting the tower green. It is unclear at this point what, if any, public participation or review process is contemplated for the result of any of these discussions, but regardless, a further process would need to be factored into the timeline. Even if Vertical Bridge committed to all the additional excavation and road work there, there would still be 50 feet of tower above the tree lines, and all the racks and antennas visible above the canopy as well.

Accordingly, consideration of this kind of proposal would require at a minimum:

1. A new balloon test at the new location, with appropriate public notice, after the leaves fall off later in autumn; and
2. A simulated as-built analysis.

This would need to happen while the parties to the suit agree between themselves to stay the litigation while they pursue these settlement efforts. At this point, we have no idea what exactly the Planning Commission and the County Commission might be considering as terms of settlement at next week's meetings on September 6 and 7, respectively, but we hope you understand that arbitrary on-the-spot decisions would not be fair to the community, or appropriate.

We have sent this letter both to the Planning Commission and the County Commission, to ensure that the public interest in transparency, and following the terms of the Ordinance, are

taken into account. *Please include this letter in any briefing materials for those meetings, under the respective agenda items.*

Sincerely yours,

Corey Ash, JoAnn Ash, Tommy Ash, Cheryl Lee Avery, Jon E Avery, Roberta Cohen, Theresa Fahy, Charlotte Fremaux, Emmett Fremaux, Lani Fremaux, Rachel Grogan, Jack Hahn, Daniel Kaseman, Alexander Korovin, Eddie Love, Adam McDowell, Robert Montague, Jaclyn Peterson and Rachel Shub

Attachments:

1. Zoomed view of Schematic showing surveyor measured location of proposed monopole facility with centerline of pole setback 163 ft from south edge of Lakeside Drive. Page 16 of 400, June 13, 2023 Meeting Packet.
2. Satellite view photo of proposed monopole as originally submitted to Planning Commission. Page 22 of 400, June 13, 2023 Meeting Packet.
3. Satellite view of monopine showing distance measurement of 275 ft from monopine to landing zone. Page 15 of 15, August 18, 2023 Settlement Communication.

ZONING: RURAL

VERDINE O JR &
DEBRA D PALMER
PID: 19-06-0006-0020-0000
DB 781 PG 392
ZONING: RURAL

PROP VERIZON WIRELESS
COMMUNICATIONS FACILITY
WITH 100'-0" MONOPOLE, SEE
SHEET C-2 FOR ENLARGEMENT

SHANNONDALE ENTERPRISES INC
PID: 19-06-0006-0009-0000
ZONING: RURAL

EX HOUSE, TYP

100'-0"
STREAM
BUFFER

100'-0"
STREAM
BUFFER

110'-0" FALL RADIUS

521'-0"±

LAKESIDE DRIVE (NV 9/14) 30' ROW

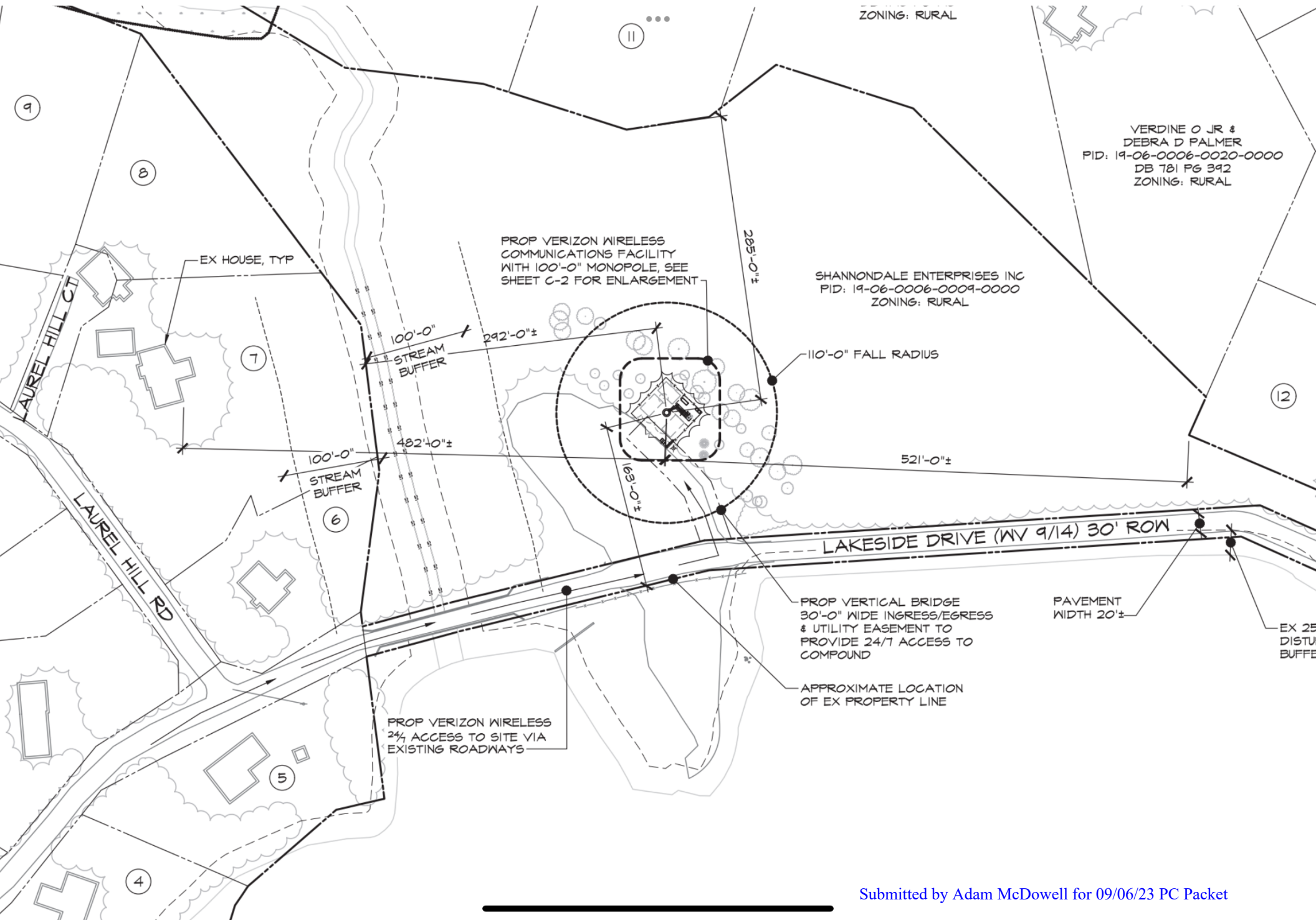
PROP VERTICAL BRIDGE
30'-0" WIDE INGRESS/EGRESS
& UTILITY EASEMENT TO
PROVIDE 24/7 ACCESS TO
COMPOUND

PAVEMENT
WIDTH 20'±

EX 25'
DISTURBANCE
BUFFER

APPROXIMATE LOCATION
OF EX PROPERTY LINE

PROP VERIZON WIRELESS
24/7 ACCESS TO SITE VIA
EXISTING ROADWAYS





Submitted by Adam McDowell for 09/06/23 PC Packet

Figure 2 – Aerial Image of Monopole Location (jefferson.wvassessor.com)



**SETTLEMENT
COMMUNICATION
NOT FOR USE IN
COURT**

Law Office of Robert J. Berg PLLC
19 Carriage House Lane
Mamaroneck, New York 10543
(914) 522-9455
robertbergesq@aol.com

RECEIVED
SEPTEMBER 1, 2023
Jefferson County, WV
Office of Planning & Zoning

August 23, 2023

BY EMAIL

Mike Shepp, President
Jefferson County Planning Commission
Office of Planning & Zoning
116 E. Washington Street
Charles Town, West Virginia 25414

Re: Jefferson County Planning Commission Meeting
Tuesday, August 29, 2023 at 7:00 P.M.

Discussion of VB BTS, LLC v. Jefferson County, West Virginia &
The Jefferson County Planning Commission, Case No. 3:23-CV-171
(N.D. W. Va.)

Dear President Shepp and Honorable Members
of the Jefferson County Planning Commission:

I am Robert J. Berg, an attorney admitted to the New York and New Jersey bars, who has been retained by the Shannondale Vista Association and a number of property owners and residents whose properties abut or are within the viewshed of the site located at 1329 Lakeside Drive, parcel ID number 06000600060000, Jefferson County, West Virginia, upon which VB BTS, LLC ("Vertical Bridge") proposes to build and operate a 100-foot tall cell tower.

My clients provided public comments in opposition to this ill-conceived project at the Public Workshop which the Jefferson County Planning Commission (the "Commission") held on June 13, 2023 -- its single public meeting to address the Vertical Bridge project. At the conclusion of the Public Workshop, the Commission voted 4-2 to deny Vertical Bridge's application for the proposed tower, finding that the proposed tower fails to meet the requirements of Article 4B, Wireless Telecommunications Facilities, of the County Zoning Code, and the County Comprehensive Plan. We thank the Commission for appropriately denying this project.

On July 13, 2023, Vertical Bridge filed a lawsuit in the United States District Court for the Northern District of West Virginia against Jefferson County and the Commission, alleging that the Commission's June 13, 2023 denial of Vertical Bridge's proposed tower application violates the federal Telecommunications Act of 1996 (the "TCA") because the denial purportedly

is not based on substantial evidence in the record and allegedly constitutes an effective prohibition of the provision of personal wireless service.

Vertical Bridge's meritless action comes as no surprise. This is what nearly all unsuccessful cell tower companies do when a local government appropriately exercises its local zoning authority under the TCA. In fact, Congress expressly preserves in Section 332(c)(7)(A) of the TCA the authority of "a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless facilities," subject to certain limitations. *See* 47 U.S.C. §332(c)(7)(A). Nevertheless, the deep-pocketed tower companies race to federal court and try to intimidate overburdened local government attorneys with a complex federal lawsuit that the government attorneys often mistakenly believe may bankrupt the local governments with massive monetary damages and attorney's fees and costs should the local governments lose. But this is only a bluff! Local government attorneys fall for it all the time, and they rush to settle cases like Vertical Bridge's instant case when they should, instead, stand up for rightful decisions made by government officials in the public interest.

Notably, the TCA does not provide successful telecom plaintiffs with monetary damages or an award of attorneys' fees and expenses. The U.S. Supreme Court held in *City of Rancho v. Abrams*, 544 U.S. 113 (2005), that an action under 42 U.S.C. § 1983 does not lie to enforce an action for violations of §332(c)(7) of the TCA. *Simply put, no monetary damages or attorneys' fees may be recovered for a successful prosecution of §332(c)(7) of the TCA.* The only relief available to a successful plaintiff is injunctive and declaratory relief. The bottom line is that in the unlikely event that Vertical Bridge prevails in the federal court litigation -- the worst that can happen is that the court orders this Commission to approve the project that it denied on June 13. That's it. Jefferson County may have to expend some monies defending the lawsuit -- if, for some reason, the County's liability insurance policy doesn't cover the claim. But the federal court must process the lawsuit on an expedited basis, and little discovery generally takes place so any attorneys' fees are generally modest. Thus, this Commission should simply do its job as best it can, unintimidated by Vertical Bridge's federal lawsuit. And that job is defending the lawsuit and protecting the public interest which the Commission did by denying Vertical Bridge's application in the first place.

However, recent developments leave my clients very concerned that the County and the Commission may be falling for Vertical Bridge's blatant subterfuge. Certainly, placing Vertical Bridge's "potential resolution/settlement offer" before the Commission on the August 29, 2023 meeting agenda -- without any disclosure to the public about the nature of the settlement offer and without permitting any public comment -- is both quite odd and non-transparent. It's particularly alarming since Vertical Bridge's lawsuit literally has just begun, and nothing has yet occurred in the litigation which would warrant such an early settlement. Most distressing is the prospect that the Commission might act without fully engaging in an open discussion with the public about whatever the settlement might entail.

My clients' attempts to gather any useful information about the August 29, 2023 Planning Commission meeting or the settlement offer have been unproductive. However, the Mountain Lake Club, the owner of the property where the tower is proposed to be located, posted on

Facebook five days ago a "photo" showing a proposed monopine cell tower at the site along with some comments suggesting that a monopine will solve all of the Commission's concerns. A monopine cell tower is simply a monopole cell tower camouflaged badly as a fake pine tree. *Even on the Mountain Lake Club's Facebook post, the photo-simulation of the 100-foot tall monopine looks like a giant vertical toilet bowl brush head.* This unnaturally tall mutant industrial tree soars high above the backdrop of the natural treeline behind it. But worst of all, nothing stands between the green monster and the shoreline of Lake Shannondale itself, ensuring that all property owners and visitors looking towards the north shore of the lake will be forced to view the fake tree cell tower in all its glory. Ironically, at the June 13, 2023 Public Workshop, even Verizon's representative acknowledged that dressing up the cell tower as a phony pine tree is just putting lipstick on a pig. He stated, in a rare moment of honesty:

It's not, it's not pretty. It's awful to be honest. I've only been in the business for three years, and every monopine I have seen has been worse than a monopole. So I can discourage that. I mean, you would think that it would help because it's going to have branches, but those are an eyesore, and they're not typically a help. And they look more like a cell tower than a cell tower.

From a viewshed degradation perspective, the monopine is just as bad as its failed predecessor -- a bald metal cell tower. Neither version comports with the purpose and legislative intent behind the Zoning Ordinance. Section 4B.1 states that "[t]he purpose of Article 4B, Wireless Telecommunications Facilities, is to balance the needs of residents of and visitors to Jefferson County for reliable wireless telecommunications networks and services *with the community's desire to preserve the County's rural, historic and agricultural character and the quality of its residential neighborhoods.*" Sticking an industrial, giant fake pine tree cell tower in a beautiful residential lakefront setting is not a balancing of needs -- it's simply accommodating greed.

The proposed location, in this lakeside rural mountain community, a mile or so from the historic Appalachian Trail and just outside the boundaries of the Harpers Ferry National Historic Park, the Shannondale Springs Wildlife Management Area, and the ruins of the historic Shannondale Lodge runs so counter to the goals of Article 4B that it is laughable. The proposed facility, even cloaked as a fake pine tree, doesn't belong in a residential area, especially not one prized for its open lakefront and mountain views.

Nor does it belong adjacent to a major State-owned wildlife management area. According to the Potomac Valley Audubon Society, the Shannondale Springs Wildlife Management Area, located just yards away from the proposed tower site, is a prime stopover and breeding ground for a large number of migratory bird species, including Prothonotary, yellow, and yellow-throated warblers, yellow-breasted chat, American redstart, Louisiana water thrush, Northern Parula and Common Yellowthroat, along with rarer warbler varieties. Great blue heron, green heron, great egret, double-breasted cormorant, common and red-breasted merganser and occasionally, tundra swan and grebes use the area from late summer to early winter. In a recent landmark paper, "Effects of non-ionizing electromagnetic fields on flora and fauna, part 1. Rising ambient EMF levels in the environment," *Rev Environ Health*, 2021 May 27; 37(1):81-122, renowned researchers BB Levitt, Henry Lai, and Albert Manville reviewed over 1200

research studies and concluded that that current low-level EMF exposures from cell towers and other wireless communications facilities can have myriad adverse and synergistic effects, including on orientation and migration, food finding, reproduction, mating, nest and den building, territorial maintenance and defense, and on vitality, longevity and survivorship itself on wildlife. Such serious effects have been observed in mammals such as bats, cervids, cetaceans, and pinnipeds, among others, and on birds, insects, amphibians, reptiles, microbes and many species of flora. A 100-foot tall cell tower, whether bare or dressed as a fake pine tree, has no place next to a biodiverse wildlife management area, the iconic Appalachian Trail, and the Harpers Ferry National Historic Park.

But beyond the destruction of magnificent views -- which will cause substantial devaluation of nearby property owners' property values -- and the danger to flora and fauna -- a 100-foot tall monopine which is located just a couple of feet from a clean freshwater lake and very close to Furnace Run, a stream, is an environmental disaster waiting to happen on another front. A monopine cell tower is, as stated above, a monopole cell tower which is cloaked in fake pine branches and limbs which are themselves covered by fake pine needles. The phony pine branches and limbs are generally made of fiberglass reinforced plastic ("FRP"). The fake pine needles are made out of PVC, and are glued onto the fake pine branches. Lots of fake PVC pine needles are required to hide a 100-foot tall cell tower and all of the antennas and associated equipment. Indeed, in my experience, Vertical Bridge's proposed 100-foot cell tower, if built as a monopine, will require about 10,000 pounds of fake PVC pine needles to "camouflage" the tower.

Now, here's what happens when a monopine is installed in the real-world. The PVC fake pine needles and the plastic branches and limbs are exposed to the elements 24/7. In the Harpers Ferry area, this monopine will endure harsh environmental conditions. It will be subjected to severe winds, thunderstorms, possible tornados, wind shear, tropical storms or hurricanes, snowstorms, ice storms, snow and ice loads, extreme temperature variations, and high UV exposure. The PVC fake pine needles in particular become extremely brittle as a result of environmental exposure, and they snap apart into fragments very easily at the slightest touch. As a consequence, pieces of the PVC branches and sprigs of PVC pine needles and individual PVC pine needles will break off the monopine frequently, especially during severe weather events. The plastic fragments will be carried away from the monopine by wind and gravity, falling across a wide debris field below. Given the close proximity of the proposed tower to Lake Shannondale and to Furnace Run, substantial quantities of PVC pine needle fragments will inevitably fall or be carried by the wind and run-off into the Lake and into the stream. The "shedding" from these monopines is so rapid and severe that the monopines must be re-foliated every two or three years. The discharge of PVC material from these monopine towers constitutes a major uncontrolled solid waste discharge that is prohibited under the federal Clean Water Act, and undoubtedly, under the environmental pollution laws of the State of West Virginia. Moreover, the PVC waste breaks down into smaller and smaller fragments, which further degrade into microplastics, and eventually will wind up in Lake Shannondale and Furnace Run, as well as contaminating the soil in the debris field around the tower. Furnace Run is a tributary of the nearby Shenandoah River, and PVC and FRP shards and fragments that fall or run off into Furnace Run will be carried downstream into the Shenandoah River.

Microplastics contamination is a relatively new discovery, but poses a serious risk to the fish and amphibians that ingest the microplastics either directly or indirectly through the food chain. Humans too are at risk from ingesting such microplastics by eating fish or by other exposure in the Lake or its environs. Recently released peer-reviewed studies have found microplastics present in human blood, human lung tissue, and in the placentas of pregnant women. See Heather A. Leslie, *et al.*, "Discovery and Quantification of Plastic Particle Pollution in Human Blood," Vol. 163 *Environment International* 107199 (May 2022).

Thus, camouflaging Vertical Bridge's original 100-foot tall monopole as a monopine is no solution, and actually exacerbates the problem by creating significant additional environmental hazards -- solid waste pollution and microplastics pollution. If a "monopine" is Vertical Bridge's proposed settlement offer, this Commission must seriously examine the negative impacts that a monopine will cause, while still not solving the visual degradation and property devaluation issues, among others, that caused the Commission to deny the project in the first instance.

We hope and expect that the Commission will engage in an open process with the community and the public in addressing this important matter. In any event, my clients are planning to file a motion for intervention in the federal court action in order to assure that their interests are adequately protected. My clients look forward to attending the Commission's meeting on August 29, 2023. In the meantime, should the County Attorney wish to speak with me, he should feel free to do so.

Respectfully,

/s Robert J. Berg

cc: Nathan Cochran, Esq.

August 24, 2023

By email

Jefferson County Planning Commission
Office of Planning & Zoning
116 E. Washington Street
Charles Town, West Virginia 25414

Dear Commissioners,

We are residents and property owners in Shannondale who support your well-founded vote on June 13 against the application for a 100 ft monopole cell tower next to Shannondale's scenic dam/spillway. We formed the Shannondale Vista Association upon news that the Applicant, tower builder Vertical Bridge, was intending to appeal your decision. We were shocked to have learned last week that, rather than file a simple response in Federal Court on the due date, August 18, the Planning Commission is instead entertaining a "settlement offer" by Vertical Bridge that has not even been published for consideration by the public, let alone been submitted for consideration in accordance with normal rules. ***We urge you to reject this offer, because your vote was the right one for our community, well-justified under Jefferson County rules and consistent with the Comprehensive Plan.***

Since the June 13 hearing we have become even more aware of the defects in the original application's file-- inadequacies and inconsistencies that confirm the wisdom of your decision. Moreover, from what we have heard from the Mountain Lake Club owners about the settlement offer, it should be treated and processed as a new application. But, ***as explained amply in the accompanying submission by our lawyer, Mr. Robert Berg, this new "Monopine" proposal only adds to our—and your—original concerns***; it does not offer a solution to address the basic problem of imposing an ugly, intrusive, and hulking tower in an area built specifically for its scenic view and enjoyment of the lake. As set out further below, and in the accompanying submission by Mr. Berg, there is no reason to accede to the demands of Vertical Bridge.

Please do not reverse your decision that is so important for Jefferson County residents and property owners, whose quality of life, real estate values and enjoyment of West Virginia's tourism would be permanently damaged by an arbitrary and unjustified reversal of the Planning Commission decision.

A. Monopine proposal

We received no information from the Planning Commission regarding the content of the settlement proposal. However, we recently learned that prior to the due date for filing a response in Federal Court, the Applicant had provided new documentation to the Planning Commission's legal counsel, including a photoshopped picture of the tower to include "camouflage" in the form of a plastic "monopine". As described in the attached letter by Mr. Berg, the monopine would only be adding innumerable problems to the original application.

First, the structure would still be well above the 50 ft tree canopy and out of character with surrounding vegetation. Even if the plastic were not so obviously a fake agglomeration of plastic, the woodlands around the lake have almost no tall pine trees. There are only some small Eastern red cedars, and the larger canopy trees are oak, hickory, big tooth aspen, and tulip. Smaller understory trees are dogwood, sassafras and cherry. None of the trees in this area approach anywhere near the 100 ft height of the monopine proposed. A 100 ft monopine would be startlingly out of character.

Second, the composition and physical attributes of this “camouflage” has not previously been considered by the Planning Commission. These structures start to shed plastic “needles” with any strong weather events, such as wind, storms, snow etc. and start to leech into the surrounding groundwater, lake, streams etc. How can such a potential environmental disaster even be considered for an area that prides itself on the clean waters of Lake Shannondale and surrounding Shenandoah River?

Therefore, the “settlement offer” is in effect a new proposal for which no procedural and regulatory safeguards—including transparency, public inputs and participation, and environmental assessments-- have been undertaken. For many reasons more amply described by Mr. Berg, this element provides yet another reason for the Commission’s taking a “better safe than sorry” approach. It is not a viable alternative.

B. Some of the obvious deficiencies in the Vertical Bridge Concept Plan

In case anyone on the Commission or the Staff wrongly recalls that aesthetic concerns were the only reasons for opposing the application, we are presenting a few obvious deficiencies in the original application. The Planning Commission’s June 13 decision to deny the application was correct and appropriate under the Jefferson County Zoning Ordinance, given the size, the area and location of the proposed tower. Vertical Bridge’s application was very cursory, missed basic requirements, and did not meet the burden of proof required by the Ordinance.

The Jefferson County ordinance required a demonstration of a “bona fide need” by the Applicant for the height and location of a proposed tower, and to prove that a substantial gap in current coverage exists to justify need for the tower. Section 4B.7.D. imposes an “Applicant’s Burden of Proof” for “**demonstrating by substantial evidence in a written record that a bona fide need exists for the proposed structure at its proposed height and location.**” This drives home the point that the applicant must fully demonstrate need for both the proposed height and the location.

Vertical Bridge did not meet these criteria, relying merely on unfounded assertions. There was no actual showing of a gap. Nor, despite the County’s preference for collocation on existing structures, did the applicant examine any alternative deployment configurations, specifically “small cells” on existing utility poles to assure a least intrusive, technologically feasible solution.

While the various defects in propagation maps require a technical consultant (that was not sought by the Planning Commission staff, but could have been under Section 4 and chargeable at Applicant’s expense), some basic problems were evident upon closer examination.

- The propagation modeling was described as presenting effects both with and without the proposed Lake Shannondale tower, assuming only a single option for an antenna centerline height of 95 feet. There was apparently no additional modeling performed for comparative purposes at lower antenna centerlines to determine how adjustments to antenna height might impact the alleged coverage gap.
- Likewise (as detected by Commissioner Fisher's question about whether a 50 ft monopole was considered), the only option Vertical Bridge analyzed is a single tower instead of several lower height facilities (such as so called "small cell" antennas mounted on utility poles within the public right of way along Mission Road.) In fact, there was apparently never any consideration of small cell wireless facilities mounted in the public right of way, despite repeated mentions in the Jefferson County ordinance that small cells are an encouraged technology deployment. Apparently, small cell deployments are not a focus of the Vertical Bridge business model and, hence, were never given any consideration.¹
- Nine other nearby towers with Verizon antennas (arrayed in a rough semi-circle in two states) were described as "included" in the modeling. Those nine various antenna locations are depicted by small "bullseyes" on the two propagation maps presented to the Planning Commission.² However, the Commission was provided with no information about the number, types, heights, power output and broadcast frequencies of those existing antennas, nor whether Verizon has or would consider changes to existing antenna configurations (including additional antennas or increased broadcast power) at, or on, those other existing sites to help improve coverage within the Lake Shannondale vicinity.
- Moreover, there was **no engineer** affidavit attesting to the parameters or variables used to create the maps as required by Section 4B.7.F.

Another deficit under the ordinance is that there was nothing in the application that considered applications approved and in train, as required by Section 4B.7.F: "maps shall identify **all** adjacent sites whether existing, **approved** or **proposed**" (emphasis added). Apparently, none of the towers recently approved by the Planning Commission or in the process of application that could accommodate Verizon antennas were included as "proposed." Nor was there attestation about towers in nearby Virginia locations that might have been recently proposed or approved.

Yet another missing piece was that, unlike other applications to the Planning Commission, the May 8 Verizon transmittal letter does not offer any **narrative conclusions** regarding the radio propagation studies, nor does it definitively certify whether antennas at 95' centerline will solve any alleged gap(s) in coverage. In the absence of narrative conclusions, it was left to Staff --and ultimately the Planning Commission--to determine coverage gaps and to locate where and how those alleged gaps might be reduced or eliminated by the proposed monopole. Evidently this potential additional Staff analysis was not done.

¹ Vertical Bridge describes itself as "the largest private owner and master-lease resource of broadband towers in the country, and we own the nation's largest portfolio of broadcast towers. Our multi-tenant, long-term leasing model ensures that carriers always have new site options and the ability to connect with their customers."

² The letter lists "Verizon's existing Rippon, Summit Point, Kabletown, Charles Town South and Mannings sites in Jefferson County, WV and Battletown and Acadia Farms in Clarke County, VA and Short Hill and Round Hill in Loudoun County, VA."

In the context of the hearing, speakers expressed confusion about the *propagation maps* presented by the applicants. An independent internet search shows the propagation map as presented to the Planning Commission without the proposed Shannondale tower is markedly different than coverage shown on FCC's official National Broadband Map prepared using data (as submitted by Verizon) dated as of December 31, 2022 (also without the Shannondale tower.)

- For this purpose, suffice it to say that FCC maps clearly illustrate that **there is in fact 4G coverage for almost all the Shannondale areas** with exception of a very narrow strip running roughly along Mission Road, and in the low-lying areas along the Shenandoah River on opposite side of the approximately 250' high foothill that separates the River from the Lake area. The areas east of the Lake are clearly shown in the official FCC maps as having ample Verizon coverage.
- Overall, consistent with the experiences of the residents who spoke at the hearing, unlike the map presented by Applicant to the Planning Commission, **there is comparatively little "white space"** discernible in the FCC National Broadband mobile service coverage map.
- The apparent lack of any "significant" gaps in Verizon's 4G LTE coverage is even more apparent when viewing the Lake Shannondale area using Verizon's own website that contains fully interactive mapping tools.³ **There, Verizon is plainly representing today that 4G LTE is available in all the Lake Shannondale environs with no discernable gaps visible.**

We do not know whether Vertical Bridge or Verizon offered to provide Staff with links to the FCC or the Verizon website mapping tools for comparative purposes. Both are easily accessible on public websites and should have been part of Staff's evaluation of the Concept Plan. Regardless, apparently neither the FCC nor Verizon.com maps were shown to the Planning Commission. These major discrepancies between maps have not been explained. But it is highly doubtful that Vertical Bridge can accurately **assert on behalf of Verizon** (which is not a party in the Federal complaint) that they have a "substantial gap in coverage" based solely on its uncertified and unsubstantiated mapping, particularly when compared to FCC maps and Verizon's own currently available marketing resources.

We also noticed **numerous discrepancies in the information provided in the balloon tests**, which was confusing to the public prior to the June 13 hearing. For example, photos and mockups for only 5 locations out of the 12 numbered yellow markers set out on the "Balloon Test Location Map (page 35 of the June 13 Meeting Packet) were provided to the Commission, without explanation. Moreover, Section 4B.7.G requires photos from "each publicly used road from which the balloon is visible"—but these additional photos required by the Ordinance were apparently not presented to the Planning Commission.

A close examination of Google Maps identifies several roads (particularly at higher elevations east of the proposed site location) where the balloon could reasonably be expected to be visible. No photos were taken in these locations. All of the locations where photos are presented are only on sites on or directly off of Lakeside Drive. Balloon shots from Fern Drive and Laurel Hill Road are not included, nor are there shots from streets at higher elevations east

³ (Ookla/MapBox using 2022 data) <https://www.verizon.com/coverage-map/>

of (and uphill from) Lake Shannondale where there could be greater panoramic views from roadways to the proposed Tower, including Eagles Nest, Rebels Roost, and Alta Vista.

These were only some of the inadequacies in the application, which in addition to the significant aesthetic concerns, provide a strong foundation for the Commission's vote against the original Concept Plan.

C. Conclusion

At the Planning Commission's meeting on June 13, 2023, we were impressed that, despite a shallow application and a resulting minimalist Staff report, members of the Planning Commission listened carefully to the many concerns voiced by the public concerning the incompatibility of the plan with the historic recreational purpose of Lake Shannondale and its pristine setting. And, at the June 13 meeting, the Planning Commission's decision correctly ascribed value to the need to preserve the quality of the residential neighborhood, consistent with the Ordinance and Comprehensive Plan. We support access to reliable and robust wireless communications—but as you know, these can be further enhanced through less intrusive approaches, as provided in the County rules.

We urge you to reject Vertical Bridge's application and the monopine settlement proposal, and invite them to apply elsewhere out of viewshed of Lake Shannondale. Vertical Bridge's business model is to build large towers loaded with racks of bulky antennas, which may be appropriate in other Jefferson County locations, but not this one.

Thank you for your kind consideration.

Shannondale Vista Association members (property owners): Corey Ash, Charlotte Fremaux, Emmett Fremaux, Lani Fremaux, Rachel Grogan, Jack Hahn, Daniel Kaseman, Eddie Love, Adam McDowell, Robert Montague, Rachel Shub

Attachment: Letter from Law Office of Robert J. Berg, PLCC, dated August 23, 2023

RECEIVED
SEPTEMBER 1, 2023
Jefferson County, WV
Office of Planning & Zoning

Dear Planning Commission Members,

During the Special Meeting on August 29th, you heard many concerns about the tower proposal at 1329 Lakeside Drive; one of which was the landing zone used for the MedEvac. While Vertical Bridge's settlement/proposal stated that the landing area is actually on the peninsula, the simple truth is that the helicopter lands majority of the time in either the gravel lot north of the peninsula or the middle of Lakeside Drive (see the modified version of Vertical Bridge's picture below).



Although it is not an FAA certified helipad, it is an official landing zone that is logged in Healthnet's database (please see Healthnet emails attached in the August 29th packet). With that said, the distance mentioned in the proposal of 275 feet from the tower to the "landing site" is invalid and is actually around 89 feet to the gravel lot and 138 feet to the center of the road (via Google Earth). Also, take note of the yellow dot entitled "1A FOR PROPOSED TOWER", which is nowhere near the location shown in the concept plan. Moreover, the large orange circle, proposed by Vertical Bridge, is erroneously sized and includes steep terrain not accessible by a helicopter or fire engines.

Furthermore, item 6 on page 2 states, "...that a helicopter could POTENTIALLY still use the location at issue." As you can see, Vertical Bridge and their legal team cannot verify whether or not the landing zone will be lost. In reference to item 7 on page 2, the proposal states, "...the property's historic (albeit sporadic) use as an emergency helicopter landing site..." Again, the main landing zone for all of Shannondale, around 3,441 residents and counting, is being portrayed as rarely used which is obviously false considering the history of its use. In reality, even if it was used "sporadically", that does not nullify the lives that have been saved by this service and thus the importance of the landing zone.

As for the owners of this property, there has been talk since they bought the Mountain Lake Club of making one of the aforementioned areas an FAA approved helipad. Unfortunately, none of that has come to fruition. A metal fence structure was also built around the same time, blocking off the peninsula area. This eliminated the constant destruction/erosion of the peninsula, thus allowing for efforts to potentially begin making a safe landing zone. Again, much time has gone by with not even a single load of gravel to establish a reliable base for landing without brown-out conditions. With that said, I and many others don't have faith that a certified helipad will be constructed. In addition, as mentioned at both the June 13th and August 29th hearings, there would still be issues landing a helicopter on the peninsula during a large mountain fire/multiple injury situation as fire engines could not efficiently enter the area and fill up with water while a helicopter is present.

In conclusion, I hope this information I have brought to light will give you a better understanding of how important this issue is and what is at stake if we lose our landing zone. Moreover, I pray that it gives all of you the motivation to fight for and defend your accurate and justified decision to reject the application on June 13th. Thank you for your time.

Regards, Corey Ash